IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 574 OF 2006
IN
APPEAL FROM ORDER NO. 187 OF 2001
IN
CONTEMPT NOTICE OF MOTION NO. 2608 OF 2000
IN
S.C. SUIT NO. 6584 OF 1997

Mrs.Rashida Banu wd/o.
late Kassam Habib & Ors. ...Applicants
V/s.
Sikandarhayat s/o. Abdul Masjid & Ors. ...Respondents

Shri J.P. Thakkar for Applicants.
Shri A.L.N. Khatri for Respondent No.1.

CORAM : A.M. KHANWILKAR, J.

DATED : JULY 25, 2006

P.C. :-

. By this application, the applicant seeks to recall the order dated 13th February, 2002 which is conditional order passed by this Court on account of which the Appeal from Order No.187/2001 stood terminated in June 2004 due to non-compliance of the direction contained in the said order.

2. The present application has been filed on 17th February, 2006. Obviously, the applicant have moved for restoration of the Appeal from Order after more than

four years from the date of conditional order dated 13th February, 2002. The explanation offered by the applicant can be discerned from the averment in paragraphs 6a and 7 of the application which says that the applicant came to know about the dismissal of order on 16th June, 2006 when appearing in the matter before the trial Court.

3. The respondents have countered the case made out by the applicant by filing reply affidavit. In the reply affidavit, particularly paragraphs 6 to 8, it is alleged that the fact stated in the application that the applicant came to know about the order dated 13th February, 2002 only in June 2006 is incorrect. One of the circumstance pressed into service is the document relied upon by the applicant herself which is appended to the civil application at page 20. This document is photocopy of the certified copy of the order dated 13th February, 2002 which mentions that application for obtaining certified copy was made on 25th November, 2004 and the same was ready on 7th December, 2004 and delivered on 8th December, 2004. It is the case of the

respondents that the applicant has approached this Court with uncleaned hand. To get over this position, the applicant has filed rejoinder affidavit but has not seriously refuted the case made out by the respondents in the reply affidavit as can be seen from the averments in paragraphs 7 to 8 of the rejoinder affidavit.

4. Ordinarily, in such a situation, the application which is barred by almost four years will have to be dismissed as the applicant has not taken steps with utmost diligence for the reasons best known to him. However, as the Appeal from Order No.187/2004 arises out of the order passed by the lower court dated 10th November, 2000 in Notice of Motion No.2608/2000 holding the applicant guilty of having committed civil contempt and by the same order she was directed to be detained for one day; in the interest of justice to give the opportunity to the applicant to contest proceeding on merits, indulgence is shown to the applicant on condition that the applicant shall pay cost quantified at Rs.5000/- to be paid to High Court Legal Services Authority. I am conscious of the fact that the cost

specified is slightly high. However, this amount has been quantified keeping in mind that delay is over four years coupled with the fact that applicant has approached this Court with incorrect statement on affidavit that she had no knowledge about the passing of the order dated 13th February, 2002. Prima facie, there is substance in the stand taken by the respondents that this statement is false to the knowledge of the applicant as the applicant has relied on the photocopy of the certified copy of the order dated 13th February 2002 which clearly shows that certified copy became available with the Advocate for the applicant on 8th December, 2002. If it is so, it is incomprehensible as to how the applicant was unaware about the passing of the said order.

5. Be that it may, this application is allowed on the above terms only by way of indulgence to the applicant so as to enable the applicant to contest main proceedings on merits, as the applicant will be detained in civil prison for one day which has serious consequence for the applicant. Cost to be paid within

one week from today as condition precedent for this order failing which office to proceed on the assumption that this application has been dismissed for non-prosecution without further reference to the court.

6. If cost is paid in time, Appeal From Order No.187/04 be placed for admission on 7th August, 2006. Applicant shall take steps for removing office objections if any on or before 3rd August, 2006. If the applicant fails to remove office objections in time, it will result in dismissal of the said Appeal from Order without reference to court by virtue of this order.

(A.M. KHANWILKAR, J.)